

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1217

UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff

VS.

DANIEL BICHARA ZOGBI,
Defendant

Criminal Action No. 76-60-1

On appeal from the United States District Court
for the District of Vermont in Criminal Action No. 76-60-1.

BRIEF OF DEFENDANT-APPELLANT

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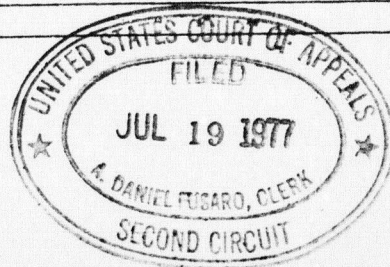


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STATEMENT OF ISSUES:

I. THE DEFENDANT HAS BEEN DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR AND IMPARTIAL TRIAL FOR THE FOLLOWING REASONS:

A. Much of the evidence admitted into the trial should have been excluded, because its probative value, if any, was substantially outweighed by the prejudicial and inflammatory effect it had on the minds of the jurors.

B. Improper arguments and final summation of the U. S. Attorney resulted in substantial prejudice to the Defendant.

C. After being deadlocked for hours, the jurors were reread selective portions of the testimony, unfavorable to the Defendant. The undue emphasis placed on those portions resulted in prejudicial error. This error was compounded when the so-called Allen charge was given to the jurors at the same point in time placing additional pressure on the jurors to conclude their deliberations.

D. The Defendant was prejudiced by the government's failure to provide the substance of any oral statements made by the Defendant to government agents, that were subsequently used in evidence.

II. THE GOVERNMENT FAILED TO ESTABLISH, AS A MATTER OF LAW, TWO OF THE THREE ESSENTIAL ELEMENTS OF THE CRIME CHARGED.

TO BE CONVICTED OF A VIOLATION OF 22 U.S.C. §2778 THE GOVERNMENT MUST ESTABLISH: (1) THAT AN ACTUAL EXPORT TOOK PLACE; (2) THAT A SHIPPER'S EXPORT DECLARATION WAS NOT FILED; (3) THAT THE DEFENDANT ACTED KNOWINGLY AND WILLFULLY.

A. No actual export of the firearms occurred.

B. The Defendant did not voluntarily and intentionally violate a known legal duty not to export the various materials mentioned in the indictment herein.

STATEMENT OF THE CASE

On August 18, 1976 Defendant Daniel Bichara Zogbi was indicted by the Grand Jury, District of Vermont, for a violation of 22 U.S.C. §1934¹ in that he did "knowingly, willfully and unlawfully export from the U. S. to Canada arms and implements of war." in violation of Federal Regulations promulgated thereunder. Specifically the materials he allegedly exported were designated by the U. S. Munitions List (22 C.F.R. §121.01) and therefore the filing of a Shipper's Export Declaration was required before the alleged export (22 C.F.R. §123.53).

Defendant's original attorney², Robert G. Bliss, Sr.,

1. Said section was repealed effective June 30, 1976 and superceded by 22 U.S.C. §2778.

2. See Tr. 8 wherein reference is made to the illness of Attorney Bliss and subsequent replacement by Attorney E. J. Tyler, III, his partner. This replacement was made in an emergency situation whereby Mr. Bliss, the only criminal practitioner in the partnership was unable to attend the trial, for which he had done almost all the preparation, because of the acute nature of his illness. The Defendant may thus have been hampered throughout the trial by his attorney's relative unfamiliarity with the case in particular and Federal Criminal Procedure in general.

filed a motion to dismiss the charge on September 14, 1976 stating that two of the three necessary elements of the alleged offense were not present. Said motion was denied on November 15, 1976 by Judge Coffrin, U. S. District Court, District of Vermont; renewed by Defendant's counsel at the close of the government's case during trial as a motion for acquittal and denied for a second time. Trial was held from February 1 to February 3, 1977 in Burlington, Vermont and, after many hours of deliberation by a jury that was at one point deadlocked (Tr. 338-339), Defendant was adjudged guilty as charged and sentenced on April 11, 1977 to one year imprisonment (all but 60 days suspended) and three years probation. Notice of appeal was timely filed on April 11, 1977.

The events from which this indictment arose occurred on or about July 28, 1976 while Defendant was enroute from New York State to Montreal, Quebec. At this time Defendant was carrying various parts for firearms destined for resale in the course of his normal and legitimate business as a firearms distributor³. In the normal manner of one entering Canada Mr. Zogbi proceeded to the Canadian Customs office at Phillipsburg, Quebec and properly declared the material he was carrying preparatory to importing it into Canada (transcript of Zogbi's testimony-25-26 and Tr. 105). (Any references to

3. Firearms Sales and Distributing, duly registered with the Government of Quebec.

the testimony of Daniel Zogbi will hereafter be denoted by: Z-Tr. because of the separate compilation of his testimony. References to the main body of the transcript will simply be denoted by Tr.) Because of the late hour Zogbi was told by Canadian Customs officials that his goods could not be cleared for entry without the help of a customs broker and without prior inspection by the R.C.M.P. to insure that a complete weapon could not be assembled from the individual parts. (Z-Tr 27 and Tr. 108). Thus he was offered the fateful choice of leaving his goods at a Canadian warehouse or going back to the U. S. while still in possession of the goods. (Z-Tr. 27 and Tr. 107). Deciding not to drive home and then return the next day, Zogbi headed back to the United States where he could stay in a motel while waiting for normal business hours. (Z-Tr. 28). Upon properly declaring the items he was carrying preparatory to his return to Swanton and explaining the prior occurrences at Canadian Customs Mr. Zogbi was asked whether he had filed a Shipper's Export Declaration prior to leaving the U. S. several minutes before. (Z-Tr. 30). After determining that no Shipper's Export Declaration was on file and examining the materials declared by Zogbi, the Defendant was questioned at length by two ununiformed Customs Agents. The interrogation proceeded for almost five hours (until approximately 5:00 a.m.) and culminated in the Defendant's arrest and dehumanizing body search prior to his transportation to the Franklin County Jail. (Z-Tr. 32) The only charge that stems from

this incident is simply failing to file a required form for export prior to a brief interval outside the U.S. At no point in time during this incident was Zogbi either informed of the necessity of filing a Shipper's Export Declaration nor given the opportunity to do so by either the Supervisor of Customs Inspectors or the Customs Agents involved.

(Tr. 139, 157) It is even more surprising in light of the knowledge requirement of the charge that Mr. Zogbi was not asked by the Customs Agents whether he was even aware of the necessity that this particular form be filed. (Tr. 161)

The trial was conducted before Judge Albert Coffrin and went far afield in its investigation of the facts relevant to this single instance of an alleged illegal export.

ARGUMENT

I. THE DEFENDANT HAS BEEN DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR AND IMPARTIAL TRIAL FOR THE FOLLOWING REASONS:

A. Much of the evidence admitted into the trial should have been excluded because its probative value, if any, was substantially outweighed by the prejudicial and inflammatory effect it had on the minds of the jurors.

Throughout this case the defense consistently maintained the position that this was a very simple, straightforward proceeding in which the only issue was that presented in the indictment. Despite numerous objections (Tr. 81, 152, 130, 278 and Z-Tr. 52, 57, 64, 69, 74) a vast amount of evidence was introduced concerning an allegedly illegal import of guns into the United States, the Defendant's knowledge of

import regulations pertaining thereto, alleged threats made by the Defendant to various government agents and the alleged associations of the Defendant to the Palestine Liberation Organization (P.L.O.), a highly feared, well publicized terrorist group.

The Federal Rules of Evidence controls what evidence is to be excluded. Evidence which is not relevant is clearly inadmissible. 28 U.S.C. Federal Rules of Evidence, Rule 402. Evidence which is relevant is subject to exclusion if there is danger of unfair prejudice, of confusion of the issues or of misleading the jury if these factors outweigh the probative value of such evidence. 28 U.S.C. Fed. Rules of Evidence, Rule 403. Rule 404(b) limits the admissibility of evidence of other crimes, wrongs or acts of Defendant and prohibits its use merely to show that the Defendant acted in conformity with past criminal character.

The main thrust of government's testimony in the case at bar was to establish that on July 25, 1976 Zogbi brought a Thompson receiver into this country illegally (Testimony of Agent Davis, Tr. 20-33; testimony of Agent Ducuennois, Tr. 69, et seq.; testimony of Agent Kopeski, Tr. 151-156; cross-examination of Zogbi, Z-Tr. 52-54, 69-75 thereby establishing intent and motive for Mr. Zogbi to illegally export this particular gun, in that if he properly declared it for export he would be apprehended for illegally importing it in the first place. Although it is permissible under Rule 404(b) to admit evidence of prior wrongs to establish

intent, motive, etc., the evidence must meet the test of Rule 403 i.e. its probative value must not be outweighed by the danger of possible prejudice and the delicate balance between the two factors must be considered. [See U.S. vs. Cook, 538 F2d 1000, (3rd Cir.-1976)]. The government's argument that this testimony was necessary to show motive and intent is severely weakened by the fact that Zogbi was given a choice by Canadian authorities to leave his goods in their custody (Tr. 107). In other words he had the choice of not bringing the goods to the attention of American Customs, but so opted merely as a matter of personal convenience. If he had the motive the government so painstakingly attempted to prove, he most certainly would not have acted as he did. Therefore, the government was allowed, mistakenly, to parade a host of its own agents before the jury to testify as to the criminal character of the Defendant. As is noted in U.S. vs. Ailstock, 546 F2d 1285 (6th Cir.-1976) the "touchstone of prejudice... is the effect of such testimony upon the jury," and the cumulative effect of three prestigious U. S. Agents as they enumerated the allegedly improper and illegal acts of the Defendant, unrelated to the alleged export, can only have been extremely prejudicial.

An analagous situation arose in U.S. vs. Kessler, 530 F2d 1246 (5th Cir.-1976), reh. den. 535 F2d 660, in which the Defendant was charged with conspiracy to illegally export firearms in violation of the same statute as complained of herein. In that case the government introduced a military-type gun as a sample of the weapon exported. The appellate

court ruled that its admission was prejudicial because the government knew the gun was purchased legally and therefore had "no known nexus to the alleged conspiracy", U.S. vs. Kessler, supra, to export firearms. Similarly the evidence introduced in the case at bar as to an alleged illegal import of firearms had no, or at best a very tenuous, connection to Defendant's failure to file the correct form for export. Whether or not Zogbi brought the receiver into the U.S. illegally is irrelevant to the crime charged herein for he could have committed the same offense even if the receiver was purchased legally in the U.S. as were the remainder of the parts he carried. It should be further noted that no limiting instruction, that the relevance of the above cited evidence should be solely confined to the issues of intent, motive or willfulness, was given to the jury. [See U.S. vs. Chestnut, 533 F2d 40, (2nd Cir.-1976)]⁴.

There are numerous other examples of evidence admitted in the case at bar which can be seen as an attempt to obtain a conviction "based on the character, personal traits, or generalized bad acts of the Defendant." U.S. vs. Robinson, 544 F2d 611, 618, (2nd Cir.-1976). This court goes on to

4. The only limiting instruction in this respect given by the trial judge (Tr. 333) merely instructed the jury to consider only the offense charged but in no way did he indicate that evidence of the wrong acts of the Defendant concerning the events of July 25, 1976 and the Thompson receiver was admissible only as to its relevance on the issues of intent or motive. [See also U.S. vs. Robinson, 544 F2d 611, (2nd Cir.-1976) for a discussion of the inadequacy of limiting instructions.]

cite Wigmore:

"The deep tendency of human nature to punish, not because our [defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court.'" 1, J. Wigmore, Evidence, §57 at 456 and goes on to reverse the conviction of the Defendant based on the admission of one piece of testimony, concerning the possession of a handgun 10 weeks after the alleged crime.

In the case at bar we are faced with a U. S. Agent's testimony that Defendant had in his possession a "ganster gun" (Tr. 23), even though it is recognized that the Defendant is a legitimate firearms dealer; an attempt to link Zogbi with alleged illegal gun dealers (Z-Tr. 63); the admission of evidence concerning alleged fraudulent invoicing at the Canadian border on a different occasion (Z-Tr. 46-49); testimony as to the alleged hoax and threats on U. S. Government agents by Zogbi (Z-Tr. 86 et seq., Tr. 268-270, 274-275) and testimony implying the government agent's belief that Zogbi was a member of the P.L.O. (Z-Tr. 72, 88-89). The above testimony, by its very nature, should have been excluded because the inherent danger of severe prejudice to the Defendant most certainly substantially outweighed its probative value.

B. Improper arguments and final summation of the U.S. Attorney resulted in substantial prejudice to the Defendant.

The question of whether improper arguments and summation of the prosecuting attorney can result in reversible error has long been discussed in the Courts of this nation. It should first be noted that there is a dual standard for review in cases where the prosecutor's remarks result in possible prejudice to the Defendant:

1. The narrow standard applied to the Federal Court's review of state courts in habeas corpus proceedings where there is a due process test as to whether the remarks made were so prejudicial so as to deprive the Defendant of a fair trial.

2. A much broader standard of review wherein the Appellate Court has wide supervisory powers over its own U. S. District Courts as in the case at bar. (See annotation titled Due Process-Prosecutor's Statements, 40 L. Ed 2d 886 and case cited therein for a much fuller discussion.) [See also Donnelly vs. DeChristoforo, 416 U.S. 637, 94 S. Ct 1868, 40 L. Ed 2d 431, (1974)].

In the case at bar much evidence, prejudicial to the Defendant was admitted over objection of counsel. The prosecutor compounded this error in his final argument by stressing the importance of this evidence in regards to the jury's deliberations. Specifically he asserted that Zogbi's motive for not declaring his goods was because "he was dead on a smuggling violation" if he did and that Zogbi went so far as to admit to smuggling (Tr. 295-296). He stresses the Defendant's alleged guilt for another offense, not that he

committed the offense charged herein. He accuses Zogbi of falsifying invoices (Exhibits 82-83)⁵ presented to Canadian Customs on a different occasion (Tr. 301). He implies that the government could have introduced information as to Zogbi's connections with the P.L.O. if they had really wanted to "get a conviction" but chose not to out of some ill defined samaritan impulse, plainly leaving that issue in the minds of the jurors⁶ (Tr. 321).

Berger vs. U.S. 295 U.S. 78, 79 L. Ed 1314, 55 S. Ct 629 (1935), in which Defendant's conviction in Federal Court was reversed, points up two factors that must be strongly considered here. One is the relative strength or weakness of the government's case because the danger of prejudice is so much greater when there simply is not enough factual evidence to prove the Defendant's guilt beyond a reasonable doubt. The evidence against Zogbi was not overwhelming - it took the jury many hours to overcome a deadlock so that any instances of prejudice must be looked at very closely.

5. See defense objection to the admission of these exhibits at p. 46 of Zogbi's testimony.

6. The prosecutor did not state outright that Zogbi was a member of the P.L.O. but by the above statements he assuredly did as much damage by implication. It is note worthy that the practice of inviting conviction by associating the Defendant with a feared and unpopular group has been condemned in numerous cases. See U.S. ex. rel. Haynes vs. McKendrick, 481 F2d 152, (2nd Cir.-1973) - appeal to racial prejudice. Brown vs. U.S., 125 U. S. App. D.C., 220 F2d 242 (1966) - spectre of martial law in violent times. U.S. vs. D'Anna, 450 F2d 1201 (2nd Cir.-1971) - appeal to jurors having to carry additional tax burden in prosecution of tax evaders. Viereck vs. U.S., 318 U.S. 236, 87 L. Ed 734, 63 S. Ct 561 - appeal to patriotism of jurors in time of war.

Berger, supra., referred to the pronounced and persistent statements by the Prosecutor as a factor in reversal. In the case at bar the prosecutor continually introduced evidence concerning the alleged import over objection and compounded that error in summary by demanding the jury's attention to just such evidence.

The "essence of an improper appeal is that it is directed to the passions rather than an understanding of the facts and law."⁷ U.S. ex rel Perry vs. Mulligan 544 F2d 674 (3rd Cir.-1976)

The prosecutor's statements herein continually led the jurors to the conclusion that Defendant was a bad man, deserving of punishment, and in the same fashion that evidence of that nature should be inadmissible (See U.S. vs. Robinson, supra), the prosecutor's statements are inherently prejudicial.

In the U.S. vs. Bugros, 304 F2d 177 (2nd Cir.-1962) the Defendant was convicted in the lower court for narcotics violations. A package of cocaine was found in his child's drawers and this court held that the Prosecutor's remarks concerning the Defendant's care for his own children's well being suggested to the jurors that Bugros was a contemptible person and for that reason the conviction was reversed. The Court stated, U.S. vs. Bugros, supra., at 179 that the only issue "was whether Bugros knew what was in those packages"

7. A habeas corpus order was vacated in this case because the prejudice involved was not strong enough to violate the narrow due process standard and because the information alleged to have caused prejudice was a matter of common knowledge.

just as in the case at bar the only issue was whether the Defendant did "knowingly and willfully export firearms" without filing the required form. Any statements in final argument suggesting the contemptible nature of Zogbi constitute reversible error.

C. After being deadlocked for hours, the jurors were reread selective portions of the testimony, unfavorable to the Defendant. The undue emphasis placed on those portions resulted in prejudicial error. This error was compounded when the so-called Allen charge was given to the jurors at the same point in time placing additional pressure on the jurors to conclude their deliberations.

The jury in this trial was out for 5 hours and 2 minutes when recalled to the Courtroom after having notified the judge of a deadlock and after having requested clarification of a portion of the testimony (Tr. 337-338). The first communication from the jury read, "We need clarification of the conversations of the 25th pertaining to the required form to export arms from the United States." (Tr. 338). There were two sides to these conversations - two diametrically opposed recollections as to who said what, one by Zogbi and one by the government agents, yet the jury was only given the recollections of the agents⁸. The jury foreman further points out that clarification of that one point might result in breaking the deadlock. (Tr. 339) The final issue of

8. See Tr. 341 where the court indicates, with a brief 2 line summary the substance of Zogbi's denial. Note that the jury does not specifically ask for the agents' testimony, only clarification of the conversation as a whole.

Zogbi's knowledge of the regulations came down to one of credibility in the jury's mind - Did the agent explain the required form or did he not? This is crucial, because when deadlocked on this point the jury is reread only the evidence adduced by the government on this most significant point. To give a deadlocked jury a rereading of only one side of a crucial and disputed issue, is to predetermine in which direction that jury will break its deadlock. Indeed, after hearing the agents' testimony on the issue the jury returned with a guilty verdict in less than one hour (Tr. 344).

Immediately after reading back one side of the requested testimony the jurors were given a supplemental Allen-type charge emphasizing the expensive nature of the trial and further delay and expense that would be incurred if a decision could not be reached. (Tr. 341-342). The combination of these two factors resulted in such prejudice to the Defendant that the Appellate Court should take notice of such plain error pursuant to F.R.C.R.P. Rule 52(b) even though no specific objection is evidenced on the record⁹. U.S. vs. Taylor, 530 F2d 49, (5th Cir.-1976) notes that an appellate court may reverse in this situation if the error seriously effects the fairness and integrity of the trial and a clear miscarriage

9. It is to be noted that much discussion between judge and counsel concerning what testimony was to be read back was not transcribed and specific objection may have been inadvertently left out of the official record. The objection sought may have been made known to the judge pursuant to F.R.Cr.P. Rule 51 although not transcribed.

of justice is to be avoided. By only causing to have the government side of the testimony read back, not only did the Court make a conviction almost inevitable but may very well have created the impression that the Court favored such an outcome.

It was noted by another Circuit that "After the jury has reported its inability to agree upon a verdict, it is, in our opinion, incumbent upon the trial judge to exercise extreme care in... permitting any evidence to be re-stated or re-read to the jurors. Unless restraint is exercised by the judge, it may well be that he would permit undue emphasis to be placed upon portions of the testimony..." Henry vs. U.S., 204 F2d 817 (6th Cir.-1953). In the instant case the trial court clearly abused its discretion in allowing such a selective portion of the testimony to be read. It is noted that the trial judge very briefly advised the jury that Zogbi denied the portions of the agent's testimony, but Henry vs. U.S., supra., at 821 points out that an admonition by the judge" to avoid any emphasis is no assurance that there was none."¹⁰

D. The Defendant was prejudiced by the government's failure to provide the substance of any oral statements made by the Defendant to government agents, that were subsequently used in evidence.

10. The Court certainly would have been within its discretion by ruling that none of the requested testimony was to be read back to avoid just such undue emphasis to be placed on this particular area of evidence. See U.S. vs. Baxter, 492 F2d 150 (9th Cir.-1973) Appeal dismissed 414 U.S. 801 Cert. Den. 416 U.S. 940.

F.R.C.R.P. Rule 16, as amended December 1, 1975, allows a Defendant to inspect, upon request, the following:

"The substance of any (emphasis added) oral statements which the government intends to offer in evidence at the trial made by the Defendant whether before or after arrest in response to interrogation by any person then known to the Defendant to be a government agent".

Request was duly made for discovery of these statements by Motion dated September 14, 1976 and said motion was granted by the Court during a hearing held November 15, 1976.¹¹

The Notes on Advisory Committee on Rules, 18 U.S.C.A., F.R.C.R.P. Rule 16, at 366 indicate further that the new amendment provides for mandatory disclosure by the government of any oral statements made by the Defendant to a government agent that the prosecuting attorney intends to use in evidence. The trial Court's ruling that Rule 16 applies only to statements included in reports of government agents (Tr. 8), is clearly inconsistent with both the letter of Rule 16 and the committee's notes thereunder.

Defendant's counsel was notified by letter from the U.S. Attorney dated January 27, 1977 that the substance of various oral statements of the Defendant's would not be

11. In Defendant's motion dated September 14, 1976 the substance of any statements covered by the cited portion of Rule 16 was requested. On page 1 of the transcript of the November 15th hearing the trial judge notes in addressing Defendant's counsel that "the government will comply with all your requests".

revealed prior to trial because they were not contained in written reports. (A copy of said letter is reproduced herein and attached as an addendum to the brief.) This violation of the letter and spirit of Rule 16 resulted in substantial prejudice to the Defendant in that he was not able to prepare adequately in advance for the implications of such statements. This is the very prejudice that the amendment to Rule 16 was enacted to prevent.

Agent Duceunnois testified that after explaining the various import and export regulations to Mr. Zogbi that the Defendant understood all that had been said (Tr. 86) thereby indicating the requisite knowledge on the Defendant's part. This statement, which contradicts much of Zogbi's testimony and should have been provided pursuant to Rule 16, was not given in advance of trial to Defendant's counsel.

Numerous government agents also testified on rebuttal (Tr. 269, 274) that Zogbi made various statements threatening their jobs and livelihoods. These potentially damaging and inflammatory statements had also not been furnished to the Defendant prior to trial.

The Court in U.S. vs. Villa, 370 F. Supp. 515 (D.C. Conn.-1974) indicates while citing U.S. vs. Garrett, 305 F. Supp., 267 (D.C.N.Y.-1969) at 268 that a Defendant is "'entitled to the equivalent in writing of what [he] had to say - no matter how he said it-with respect to the crime charged.'" This case stresses the pressing need of Defendant and his counsel for access to all past statements, a need which certainly was neglected in this case.

In U.S. vs. Taylor, 536 F2d 1343 (10th Cir.-1976) the Court notes that oral statements made by the Defendant to an arresting officer and introduced by the government in rebuttal would have been discoverable under the 1975 Amendment to Rule 16 and further that the government would have been compelled to disclose the substance of those statements to the Defendant prior to trial. It is further noted in U.S. vs. Callahan, 534 F 2d 763 (7th Cir.-1976) at 765, footnote 2, that any ambiguities in the old rule were eliminated by the new amendment in that the Defendant would now be entitled to discover the substance of any statements if made to someone known to be a government agent.¹²

The admission of the above testimony herein was especially damaging to Zogbi when considered in light of the relative weakness of the government's case, the crucial nature of the issue of the Defendant's knowledge of the exportation requirements and the difficulties encountered in preparation of the case by the late substitution of counsel.

II. THE GOVERNMENT FAILED TO ESTABLISH, AS A MATTER OF LAW, TWO OF THE THREE ESSENTIAL ELEMENTS OF THE CRIME CHARGED. TO BE CONVICTED OF A VIOLATION OF 22 U.S.C. §2778 THE GOVERNMENT MUST ESTABLISH: (1) THAT AN ACTUAL EXPORT TOOK PLACE; (2) THAT A SHIPPER'S EXPORT DECLARATION WAS NOT FILED; (3) THAT

12. In U.S. vs. Johnson, 525 F2d 999 (2nd Cir.-1975) this court held under the old rule that a written summary of an oral statement was discoverable (although the lack thereof was not prejudicial because that Defendant had made three other separate admissions of the crime charged), but went on to quote the amended portion of Rule 16 implying that such a decision would not have been necessary had the new rule been in effect, because of the clarity of the amendment in allowing such discovery.

THE DEFENDANT ACTED KNOWINGLY AND WILLFULLY.

A. No actual export of the firearms occurred.

The issue of the existence of an actual exportation was raised on a pretrial motion to dismiss and renewed at the time of the trial. (Tr. 164-5) In both instances the motion was denied.

The issue of exportation arises because an exportation occurred, if at all, only in the most technical sense. Mr. Zogbi and his few munitions left this country for only a scant period of minutes and for a short distance of yards. After crossing the border and conferring with Canadian officials for several minutes, Mr. Zogbi voluntarily elected to return to the United States.¹³

The term export has been defined in various ways by various bodies. The Supreme Court has defined export in terms of the landing in and shipment to another country.

U.S. vs. Chavez, 228 U.S. 525 (1913)¹⁴ Lower federal courts

13. A somewhat similar situation arose in U.S. vs. 200 Watches, 66 F. Supp. 228, (S.D.N.Y.-1946) wherein the Court was construing the rights of U.S. Customs to seize illegally exported goods. The master and purser of a ship bound for Japan were taking watches and other goods out of this country illegally for black market resale to U.S. servicemen. However, they were turned back and attempted to re-enter the U. S. where the articles were properly declared. The Court ruled that the attempt to export had terminated and that the goods were no longer subject to seizure as they would have been when they first left the U.S. Similarly in this case the attempt to export ceased when Zogbi returned to the U.S. with the munitions. At the time of arrest Mr. Zogbi was, if anything, importing the munitions into this country.

14. The definition of export was limited in this case because the resolution being construed intended to prevent domestic violence in foreign countries, to which arms might be shipped, and to allow the landing of arms in a foreign port would defeat that aim.

previously used the same rule in interpreting a customs export statute in terms of "taking goods out of one country into another, and there unlading them." Kidd vs. Flagler, 54 F. 367 (1893); reversed on other grounds. 78 F. 381. It is evident in this case that the goods were never landed or unloaded in Canada. (Tr. 113, Z.-Tr. 28). Therefore exportation never occurred.

The Code of Federal Regulations contains a definition of export which is excessively broad. Export is defined as "taking out of the United States in any manner" materials on the U.S. Munitions List. (22 C.R.F. §121.18) Such a definition would encompass activity that is clearly not intended to be proscribed by 22 U.S.C. 2778 (i.e. plane flying from Maine to Vermont and strays over Canadian soil; hunter crosses unmarked border while hunting; boat on Great Lakes is blown off course and onto Canadian side): and consequently this agency definition must be considered self-serving, overly broad and subject to judicial interpretation.

The technical nature of the export is illustrated when events which occurred several days earlier are compared with events occurring on the night of the arrest. On July 25th Zogbi had brought certain firearms into the U.S. for the purpose of attending a gun show and having repairs done on one particular firearm (Tr. 21) and had stopped thereafter to declare them at U.S. Customs. (Tr. 22) At that time he was told by U.S. officials that he could not enter the U.S. with those firearms and, therefore, he had to take the

articler it of the United States, (Tr. 75) an act which certainly comes within the definition of 22 C.F.R. §121.18. Yet at that point in time he was not asked to fill out a Shipper's Export Declaration nor was he arrested (Tr. 37, 42). On this occasion it was evident that the Federal Agents recognized that no actual exportation occurred, only one in the most technical sense and that such was hardly the type of activity which 22 U.S.C. 2778 was enacted to prevent. (Tr. 42) Yet three days later agents at the Vermont border crossing chose to make a criminal case out of a similar transaction. The law must be enforced uniformly - what is encouraged one day cannot be penalized the next.

At most a highly technical export had occurred. So Mr. Zogbi, who, when entering the U.S. days earlier, had been encouraged to leave this country with similiar munitions, now found himself interrogated for five hours, subject to a complete strip search and finally locked in a northern Vermont jail. And this was all due to a failure to fill out a required form, a form which could have been handed to Mr. Zogbi on the night in question. Since he had voluntarily returned to the American customs station, there was no reason to suspect criminal activity and what could and should have been a polite "Mr. Zogbi, will you fill this form out for us", became a nightmare.

B. The Defendant did not voluntarily and intentionally violate a known legal duty not to export the various materials mentioned in the indictment herein.

22 C.F.R. §123.53 requires that a Shipper's Export Declaration be filed on all arms, ammunition and implements of war contained in the U.S. Munitions List (22 C.F.R. §121.01). 22 U.S.C. §2778(c) provides criminal penalties for any person who willfully violates the provisions of that section or regulations promulgated thereunder. The element of willfulness under this particular statute has been looked into by the courts of the United States. It has been held that the "government must prove that the Defendant voluntarily and intentionally violated a known legal duty not to export the proscribed articles..." U.S. vs. Lizarraga-Lizarraga, 541 F2d 826, (9th Cir.-1976).¹⁵

Knowledge of the legal duty is certainly required before one can intentionally violate such duty. In this instance the legal duty is to file a Shipper's Export Declaration on the exportation of certain items, specifically proscribed by the United States Munitions List. Thus the legal duty is twofold -to file the Shipper's Export Declaration when one is aware that the items being exported are contained on the United States Munitions List. To intentionally violate this known legal duty one would have to know both that the exportation of certain items was regulated and that when specific items were exported a certain form must be filed.

15. U.S. vs. Lizarraga-Lizarraga, supra., points to U.S. vs. Bishop, 412 U.S. 346, 93 S. CT 2008, 36 L. Ed 2d. 941 (1973) wherein the Supreme Court, construing "willful" in the Internal Revenue statutes, indicates that bad faith or evil intent is a necessary prerequisite to willfulness.

The trial judge in his charge states merely that "in order to find the Defendant guilty of a willful failure to file the Declaration you must find that he knew that the Shipper's Export Declaration was required to be filed, and that he intentionally and deliberately failed to comply with that requirement or acted in deliberate disregard of the requirement." (Tr. 335) The jury was not advised that the Defendant must also specifically know what items are controlled by this particular regulation.

Although stipulated that the items exported were, indeed, contained on the list (Tr. 53, 54), nowhere in the testimony of Zogbi or any agent is there any mention that he had prior knowledge of that fact.¹⁶ Willful violation of the regulation must include a failure to file a Shipper's Export Declaration on articles specifically proscribed by that list. Even if Zogbi knew generally, as alleged by the government, the requirement to file, he had no way of knowing whether the specific articles he carried on the day in question were included on that list. The court in U.S. vs. Lizarraga-Lizarraga, supra., at 828, recognizes that difficulty and notes the complexity of the munitions list, indicating that certain items on that list might be exported innocently, unlike heroin or other substances known generally to be

16. Rather there is only a vaguely worded declaration by the Customs Agent that, "I think, if memory serves correctly, any firearm type articles were to be made mention of, officially." (Tr. 28). This is hardly an adequate explanation of the complexities of the U. S. Munitions List.

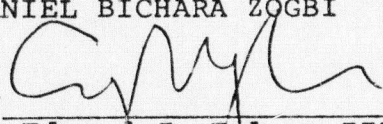
controlled by the government. In fact several agents at the trial testified to the complexity of various export and import regulations and admitted their personal lack of knowledge thereof. (e.g., Tr. 140) Thus, it is difficult to understand how a twenty year old Canadian citizen is expected to have knowledge of specific items listed in detailed regulations he has never seen. It is clear that the Defendant did not possess the requisite knowledge to willfully violate the regulation in question.

CONCLUSIONS

Since two of the three essential elements of the crime charged were not established, as a matter of law, the Defendant's conviction should be reversed. In the alternative the cause should be remanded for a new trial because of the substantial prejudice offered the Defendant as a result of the factors cited above.

Dated at St. Albans, Vermont this 15th day of July, 1977.

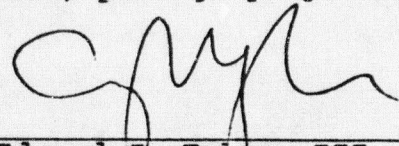
DANIEL BICHARA ZOGBI

By 

Edward J. Tyler, III
His Attorney

CERTIFICATE OF SERVICE

I, Edward J. Tyler, III, Esq., of the firm of Tyler & Bruce, do hereby certify that service of the foregoing Brief of Defendant-Appellant was made on George W. F. Cook, U.S. Attorney, by mailing to him a copy thereof, at his address at Rutland, Vermont, by first class mail, postage prepaid on July 15, 1977.


Edward J. Tyler, III

